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SUPERIOR COURT FOR THE STATE OF CALIFORNIA

COUNTY OF MERCED

LISA HAGGERTY and CHRIS SWEARINGIN, on behalf of themselves and all others similarly situated,

Plaintiffs,

vs.

CONSUMER SAFETY TECHNOLOGY, LLC d/b/a INTOXALOCK and DOES 1 - 10, inclusive,

Defendants.

Case No.: 22CV-01414

Assigned for All Purposes to Hon. Brian McCabe, Courtroom 8

NOTICE OF UNOPPOSED MOTION AND MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Hearing Date: October 28, 2024
Hearing Time: 8:15 a.m.
Courtroom: 8

Complaint Filed: May 18, 2022
Trial Date: None Set

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT on October 28, 2024 at 8:15 a.m. in Courtroom 8 of the Merced County Superior Court, located at 627 W. 21st Street, Merced, California 95340, pursuant to Code of Civil Procedure § 382, Plaintiff Chris Swearingin ("Plaintiff") will and hereby does move for an order: (1) granting class certification of the below-defined Settlement Class for settlement purposes only pursuant to Code of Civil Procedure § 382; (2) preliminarily approving the class action Settlement Agreement and Release ("Settlement" or "Agreement") between Plaintiff and Defendant Consumer Safety Technology, LLC d/b/a Intoxalock ("Defendant"); (3) appointing Chris Swearingin as the Class Representative for settlement purposes; (4) appointing Mark S. Greenstone and Benjamin N. Donahue of Greenstone Law APC as Settlement Class Counsel for settlement purposes; (5) approving the use of the proposed notice procedure and related forms; (6) directing that the Settlement Class Notice be mailed to the Settlement Class; and (7) scheduling a hearing date for a final approval hearing.

This motion is made on the following grounds: 1) all requirements for class certification, for settlement purposes only, are met pursuant to Code of Civil Procedure § 382; 2) Plaintiff and his counsel are adequate to represent the Settlement Class; 3) the Settlement is a fair, adequate, and reasonable compromise of the disputed claims in this case; and 4) the proposed notice procedure meets all due process requirements. The Settlement is made by Plaintiff, individually and on behalf of the Settlement Class Members, and Defendant. In view of the foregoing, the Settlement should be preliminary approved, notice should be disseminated to Settlement Class Members, a Final Fairness Hearing should be scheduled, and the [Proposed] Order Granting Preliminary Approval of Class Action Settlement should be entered.

This motion is based upon this notice, the attached memorandum of points and authorities, the concurrently filed Declaration of Mark S. Greenstone, Esq., the Declaration of Brandon Schwartz and the Declaration of Chris Swearingin; the pleadings and other records on file with the Court in this matter, and any other further evidence or argument that the Court may properly receive prior to,

or during, the hearing on the motion.[1]

Respectfully submitted,

DATED: September 30, 2024

GREENSTONE LAW APC

By: 

Mark S. Greenstone
Benjamin N. Donahue
Attorneys for Plaintiffs

[1] The Memorandum of Points and Authorities exceeds fifteen pages in length, which is expressly permitted under the California Rules of Court since the Motion requests, in part, certification of the Class defined in the Agreement. *See* Cal. R. Ct. 3.764(c)(2) (stating that "[a]n opening . . . memorandum filed in support of . . . a motion for class certification must not exceed 20 pages").

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff Chris Swearingin ("Plaintiff"), individually and on behalf of the "Settlement Class" (as defined below), hereby submits this motion for preliminary approval of a proposed settlement of this Action brought pursuant to the California Invasion of Privacy Act ("CIPA"), Cal. Pen. C. § 630 *et. seq*., based on the alleged unlawful recording of consumers' telephone calls without consent. Defendant Consumer Safety Technology, LLC d/b/a Intoxalock ("Defendant" or "Intoxalock") does not oppose Plaintiff's motion (Plaintiff and Defendant shall collectively be referred to as the "Parties"). The terms of the Settlement are set forth in the Settlement Agreement and Release (hereinafter the "Settlement" or "Agreement").[2] See Declaration of Mark S. Greenstone ("Greenstone Decl.") ¶ 12, Ex. 2.

The proposed Settlement provides outstanding relief to the Settlement Class Members that outstrips many comparable CIPA unlawful recording settlements, establishing a non-reversionary fund from which Class Members are eligible to receive up to $5,000 each depending on the claims rate. The majority of Settlement Class Members will receive dual Settlement Class Notices via both email and mail, with links to pre-populated online claim forms (and, in the case of the mailed notice a pre-populated tear off claim form), all of which makes the claim submission process extremely straightforward and effortless. The proposed Settlement resulted from the Parties' participation in an all-day mediation session before the Honorable Ronald M. Sabraw (Ret.) of JAMS.

The Settlement Class consists of "all natural persons listed in Intoxalock's records that have a California address and/or telephone number bearing a California prefix and who had one or more telephone conversations with an Intoxalock sales representative at any time during the period from and including May 18, 2021 through February 8, 2022."[3] The Settlement terms are outlined as follows:

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[2] Unless otherwise specified, capitalized terms used herein are intended to have the same meaning ascribed to those terms in the Agreement.

[3] The Class Period ends February 8, 2022 because it is not disputed that Defendant had an appropriate recording disclosure in place for all calls by this date.

- Size of the Settlement Class: approximately 25,672 individuals.
- Non-reversionary Gross Settlement Fund Amount: $1,747,500.00.
- Average gross settlement payment per Settlement Class Member: $68.07 (this amount is well above the range of settlements regularly approved in both state and federal court for CIPA cases; courts in California have approved as little as $6.98 per class member).
- Requested Class Representative service award: $5,000.00 to Plaintiff Swearingin.
- Requested Settlement Class Counsel's Fees and Costs: $582,500.00 plus actual litigation costs and expenses not to exceed $35,000.00.
- Claims Administration Costs: not to exceed $79,500.00.
- Net Settlement Fund: approximately $1,045,500.00. The entire Net Settlement Fund shall be distributed and paid to Authorized Claimants. Each approved claim shall be entitled to a pro rata share of the Net Settlement Fund, subject to a per person cap of $5,000.00. If any funds remain in the Net Settlement Fund after Authorized Claimants have been paid, or from uncashed Settlement Payments by the Payment Void Date, any remaining amount of the Net Settlement Fund shall be used to make a Supplemental Payment to each Authorized Claimant (irrespective of the number of claims made and only subject to the per person cap of $5,000.00). If any funds remain thereafter, they shall be distributed to *cy pres*.

As set forth herein, the Settlement is the product of informed discovery, arms-length negotiations, and provides a fair, adequate, and reasonable recovery for the Settlement Class in light of the relative strength of Plaintiff's claims, the risk, expense and uncertainty of further litigation, and the benefit conferred by the Settlement. Plaintiff therefore respectfully requests that the Court grant preliminary approval of the proposed Settlement, conditionally certify the Settlement Class, approve the proposed Settlement Class Notice, and set a hearing date for final settlement approval, among other requested relief.

II. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff[4] filed the class action complaint ("Complaint") on May 18, 2022 against Defendant in the Superior Court of California, County of Merced, Case No. 22CV-01414 (the "Action"). In the Complaint, Plaintiff alleged a single cause of action for violation of the CIPA, and in particular, Cal. Pen. C. § 632.7. Plaintiff alleged that he spoke with Defendant on his cellular telephone from approximately August 2021 to February 2022 and that Defendant recorded those calls without advising Plaintiff that the call was recorded. Complaint at ¶¶ 15-16. Pursuant to Cal. Pen. C. § 632.7, a party may not intentionally record a communication between a cellphone and any other phone without the consent of all parties to the communication. Per Cal. Pen. C. § 637.2, a party that violates Cal. Pen. C. § 632.7 may be sued by an injured party for the greater of $5,000 per violation or three times the actual amount of damages sustained. *Id.* at ¶ 28. Plaintiff's claims were brought on behalf of a class of individuals who, like Plaintiff, while residing or located in California, had a telephone conversation with Defendant on a cellular telephone that was recorded without first having consented to recordation of that call. *Id.* at ¶ 18. Based on those allegations, Plaintiff sought $5,000 per violation per Settlement Class Member, as well as injunctive relief. *Id.* at 7:8-12. Greenstone Decl. ¶ 8.

Following the filing of the Action, Plaintiff propounded two sets of extensive formal discovery on Defendant, in response to which Defendant provided written responses and produced documents. This included all calls with Plaintiff as well as example customer agreements during the putative Class Period. Thereafter, the Parties met and conferred with respect to a potential resolution of the Action and agreed to exchange additional information necessary to engage in meaningful settlement discussions, and to engage in a private mediation on November 30, 2023 with Hon. Ronald M. Sabraw (Ret.), a well-respected mediator with substantial experience handling complex class action matters. Greenstone Decl. ¶ 9.

In advance of mediation, Defendant provided Plaintiff with critical additional information

[4] The Parties have agreed to settle the claims of Plaintiff Lisa Haggerty, whose calls with Intoxalock took place outside the Class Period, on an individual basis. The Parties are in the process of finalizing the settlement with Ms. Haggerty and anticipate dismissing her within the next thirty days. Greenstone Decl. ¶ 8 n. 1.

necessary to evaluate Plaintiff's claims and the potential for a class-wide settlement including written responses to questions posed by Plaintiff regarding: (1) confirmation of the underlying facts; (2) confirmation of the Class Period; (3) the total number of calls at issue over the Class Period; (4) and examples of all written recording disclosures implemented during the Class Period. This information allowed Settlement Class Counsel to perform a comprehensive damages analysis and estimate Defendant's potential liability. Greenstone Decl. ¶ 10. Notably, this information, coupled with the information received in response to formal discovery including recordings of all of Plaintiff's phone calls, made clear the contours of the case and its potential limits. Defendant produced over 20 calls with Plaintiff; however, only the first two calls made before Plaintiff established a customer account lacked a recording disclosure. This was consistent with Defendant's position that calls with clients always had a proper disclosure and focused the case on initial sales line calls. The information provided by Defendant further established that Defendant amended its website Privacy Policy in September 2021 (*during* the Class Period) to provide a recording disclosure, and similarly amended its client agreement in 2022. *Id.*

After extensive review of these documents and armed with a damage analysis, on November 30, 2023, the Parties attended a full day mediation with Hon. Ronald M. Sabraw (Ret.). At the mediation, the Parties engaged in intensive settlement discussions during which they debated their respective positions and exchanged views regarding the strengths and weaknesses of the alleged claims. Although the case did not settle during the mediation, Judge Sabraw thereafter made a mediator's proposal on December 4, 2023 outlining the material terms of a class-wide settlement, which the Parties ultimately accepted on December 11, 2023 with the understanding that the settlement would be formally documented in a long-form agreement. Thereafter, the Parties worked diligently to negotiate and memorialize the terms of a long form settlement agreement. On September 27, 2024, after extensive discussions and multiple rounds of revisions to the agreement, the Parties entered into a fully executed Settlement Agreement and Release. Greenstone Decl. ¶ 11. Now, following substantial investigation and extensive settlement negotiations, Plaintiff moves for preliminary approval of this Settlement. *Id*. at ¶ 12.

III. THE SETTLEMENT TERMS

A. Class Definition

For purposes of settlement only, the Parties have agreed that the Settlement Class shall be defined as: all natural persons listed in Intoxalock's records that have a California address and/or telephone number bearing a California prefix and who had one or more telephone conversations with an Intoxalock sales representative at any time during the period from and including May 18, 2021 through February 8, 2022. Excluded from the Settlement Class are all attorneys and employees of Settlement Class Counsel, any judicial officer to whom this case is assigned, and persons who validly opt out of the settlement by following the procedures set forth in the Settlement. Greenstone Decl. ¶ 13; Agreement ¶ 1(o). The Class Period and release of claims covers the time period from May 18, 2021 through February 8, 2022, inclusive ("Class Period"). *See id*. ¶¶ 1(e), 13.1. The proposed Settlement Class consists of approximately 25,672 Settlement Class Members. Greenstone Decl. ¶ 14, *see generally* Agreement.

B. Amount of Settlement

The Parties have agreed to settle the class claims at issue in the Action for a non-reversionary Gross Settlement Amount of $1,747,500.00. Greenstone Decl. ¶ 15; Agreement ¶¶ 1(k), 3.1.

C. Allocation of the Gross Settlement Amount

The Gross Settlement Amount is a Common Fund and therefore, includes all requested costs, fees, and other allocations. As stated above, the Gross Settlement Amount includes: (1) attorneys' fees in the amount of one-third, i.e. 33 1/3%, of the Gross Settlement Amount, equaling $582,500.00; (2) litigation costs, not to exceed $35,000.00; (3) a class representative service award to Plaintiff in the amount of $5,000.00; and (4) notice and administrative costs, not to exceed $79,500.00. Greenstone Decl. ¶ 16; *see also* Agreement ¶¶ 3.2-3.4.

After the above-estimated amounts are deducted from the Gross Settlement Amount, the entire Net Settlement Fund of approximately $1,045,500.00 shall be distributed and paid to Authorized Claimants. Each approved claim shall be entitled to a pro rata share of the Net Settlement Fund, subject to a per person cap of $5,000.00. As set forth above, if the maximum amount were to be expended on each category, there will be approximately $1,045,500.00 to be distributed pro rata

to the Settlement Class. At a 100% claims rate, this would be approximately $40.72 per Authorized Claimant. At a 10% claims rate, this would be approximately $407.25 per Authorized Claimant. Payment will be made within 45 days of the Settlement Effective Date. Greenstone Decl. ¶ 17; Agreement ¶¶ 1(r), 3.4, 3.5. As the Settlement does not include wages, there is no tax allocation of settlement payments to Authorized Claimants. Greenstone Decl. ¶ 18; Agreement ¶ 18.1. The proposed Agreement is a non-reversionary settlement. All money from the Net Settlement Fund will be distributed to Authorized Claimants. No money from the Settlement will revert to Defendant. Greenstone Decl. ¶ 19; Agreement ¶ 3.8.

D. Release of Claims

In exchange for participating in the Settlement, Plaintiff and Settlement Class Members who do not request exclusion will release the Released Parties from all Released Claims. Agreement ¶ 13.1. The release is narrowly tailored to only release claims based upon the facts alleged in the operative complaint in the Action, for the Class Period. Greenstone Decl. ¶ 20; Agreement ¶ 13.1.

E. Cy Pres Distribution

Authorized Claimants will have 90 calendar days after the Settlement Effective Date ("Payment Void Date") to cash their Settlement Payments. If any funds remain in the Net Settlement Fund after Authorized Claimants have been paid, or from uncashed Settlement Payments by the Payment Void Date, any remaining amount of the Net Settlement Fund shall be used to make a Supplemental Payment to each Authorized Claimant (irrespective of the number of claims made). If there are not enough funds to pay each claimant entitled to a Supplemental Payment at least $10.00 (or there is still money left in the Net Settlement Fund after the Supplemental Payment is made), then the remaining amount of the Net Settlement Fund shall be paid to Consumer Federation of California (the "Cy Pres Beneficiary"). Greenstone Decl. ¶ 21; Agreement ¶ 3.6. The Cy Pres Beneficiary is a nonprofit consumer advocacy organization dedicated to protecting consumer privacy and promoting justice for all Californians in a manner consistent with the underlying purposes of the present litigation, and thus satisfies the requirements of Code of Civil Procedure Section 384.[5]

[5] See https://consumercal.org

F. Notice Administration

The Parties propose that Eisner Advisory Group LLC ("Eisner Amper") be appointed as Claims Administrator. Agreement ¶ 1(c). Eisner Amper specializes in providing administrative services in class action litigation, and has extensive experience in administering consumer protection and privacy class action settlements. Greenstone Decl. ¶ 22.

The Claims Administrator will be provided the class member list by Defendant within seven (7) calendar days of Preliminary Approval. Agreement ¶ 6.1. The Claims Administrator will update the address information provided by Defendant through the National Change of Address database prior to initial mailing. *Id.* ¶ 6.2. Within forty-five (45) calendar days from Preliminary Approval, the Claims Administrator will send the Email Notice to all Settlement Class Members on the class member list for whom Defendant possesses an email address, and the Postcard Notice to all individuals on the class member list for whom an address is available in Defendant's records or can be found by the Claims Administrator. *Id.* at ¶¶ 6.3, 6.3.1, 6.3.2, Exs. B, C. Defendant has represented it has email addresses and/or full physical addresses for approximately 74% of all Settlement Class Members. For phone numbers lacking full contact details, the Claims Administrator will attempt reverse phone lookups to identify additional email and/or mailing addresses, where available. In total, the Claims Administrator anticipates providing direct notice to a minimum of 85% of the Settlement Class. Therefore, the vast majority of the Settlement Class will receive the Email Notice and/or Postcard Notice. Greenstone Decl. ¶ 23; Declaration of Brandon Schwartz Regarding Proposed Notice Plan and Administration ("Admin. Decl.") ¶ 12.

The proposed Settlement Class Notices comply with the requirements of Cal. R. Ct. 3.766(d). The notices explain that the lawsuit involves allegations that Defendant "violated California Penal Code Section 632.7 by recording telephone calls without consent" and that "Defendant denies any wrongdoing or liability." Agreement Exs. B, C, D. It notes that "[i]f you want to keep the right to sue the Defendant…, then you must take steps to exclude yourself from the Settlement" and provides the procedure and date by which exclusion must be requested. *Id*. It notes that "[u]nless you exclude yourself, you give up any right to sue the Defendant and any of the Released Parties for the claims that this Settlement resolves." *Id*. Thus, the Settlement Class Notice complies with Cal. R. Ct.

3.766(d). Greenstone Decl. ¶ 24.

All payments shall be made within forty-five (45) calendar days of the Settlement Effective Date or forty-five (45) calendar days after the deadline for submission of claims, whichever is later. Agreement ¶ 3.5. Any Postcard Notice returned to the Claims Administrator with a new forwarding address will be remailed to the Settlement Class Member at the new forwarding address. For any Postcard Notice returned as undeliverable, the Claims Administrator will perform an additional skip-trace and, if a new mailing address is obtained, re-mail the Postcard Notice to that updated mailing address. Agreement ¶ 6.3.2. The Exclusion and Objection deadlines are sixty (60) calendar days from the initial date the Settlement Class Notice is sent, such that those who receive a re-mailed notice will have ample time to take action. Agreement ¶¶ 9.1, 10.1. Greenstone Decl. ¶ 25.

A Settlement Website will be established and maintained, in English and Spanish, and any changes of date or location of the final approval hearing will be given on the Settlement Website. Agreement ¶¶ 1(t); 6.5. Both the Email Notice and Postcard Notice will contain a GUID link or QR code that Settlement Class Members can scan to link directly to the Claim Form on the Settlement Website. *Id*. at ¶¶ 6.3.1, 6.3.2. The Settlement Website shall be maintained until at least seven (7) calendar days after the Payment Void Date, which may be up to 142 days after the Settlement Effective Date, depending on when the Claims Administrator issues Settlement Payments to Authorized Claimants. *Id.* at ¶¶ 1(n), 3.5, 6.5. Greenstone Decl. ¶ 26.

G. Responses to Notice

Claims may be submitted either electronically or by mail within ninety (90) calendar days of the Claims Administrator sending Settlement Class Notice. Agreement ¶ 8.1; Ex. A. Requests for exclusion may be submitted by mail to the Claims Administrator within sixty (60) calendar days from the date the Claims Administrator sends Settlement Class Notice. Agreement ¶ 10.1. The request for exclusion must be in writing and contain (1) the title of the Action; (2) the full name, address and telephone number of the Settlement Class Member requesting exclusion; (3) a statement that they request exclusion from the Settlement Class; and (4) the telephone number(s) with which the Settlement Class Member communicated with Defendant. *Id*. Objections may be submitted by mail to the Claims Administrator within sixty (60) calendar days from the date of the Claims Administrator

sending Settlement Class Notice. Agreement ¶ 9.1. Any objection must set forth the name and case number of this matter, the objecting Settlement Class Member's name and address, the telephone number(s) with which they communicated with Defendant, a statement of each objection, and a statement of whether they intend to appear at the final approval hearing. *Id*. The proposed deadlines are reasonable and give adequate time for Settlement Class Members to choose how to react to the Settlement—even if they receive remailed notice. Greenstone Decl. ¶ 27.

IV. CLAIM REQUIREMENT

The claims process is not burdensome because Settlement Class Members will be given several hassle free options to submit their claims. Per the terms of the Agreement, an Email Notice will be sent to every individual for whom Defendant has an email address for, which is a majority of the Settlement Class. The Email Notice will contain a GUID link to the Claim Form, with the individual's information pre-filled so that the individual only needs to electronically sign and date before submitting. A Postcard Notice will also be sent to every Settlement Class Member on the Class Member Contact List for whom a mailing address can be located, which is also a majority of the Settlement Class. The Postcard Notice, which will be provided in English and Spanish, not only contains a GUID link to the individual's pre-populated Claim Form, but is also a double post card with an accompanying pre-stamped and preprinted tear-off Claim Form. The tear-off Claim Form only requires the Settlement Class Member to sign, date, and check a box to certify that their telephone number, which shall be pre-filled on the Claim Form, belongs to the Settlement Class Member and was used to initiate one or more calls to Defendant during the Class Period. If the Settlement Class Member visits the Settlement Website without using their GUID link, they will only additionally be required to provide a unique code on their Claim Form, a code which appears on their Settlement Class Notice. Agreement at ¶¶ 6.3.1-6.3.2, 8.1-8.4; Exs. A-C. *See also* Admin. Decl. ¶¶ 12-13. Thus, the process has been made to impose as little burden as possible on the Settlement Class while still satisfying the requirement of confirming that the people contacted are Settlement Class Members. Greenstone Decl. at ¶ 28.

Settlement Class Members will be required to submit claims in order to receive *pro rata* shares of the Net Settlement Fund. A claims process is necessary because the Parties do not have current, full contact information for every Settlement Class Member, but instead have a combination of telephone numbers, dates of calls, email addresses, and names. Accordingly, claim forms will be sent to individuals associated with the telephone numbers that Defendant's records indicate engaged in a call with Defendant's sales representatives during the Class Period, and those individuals may confirm that they were the users of those phone numbers and made and/or received the calls at issue. Based on Defendant's representations, the Claims Administrator anticipates providing direct notice to a minimum of 85% of Settlement Class Members. Greenstone Decl. at ¶ 29; Admin. Decl. at ¶ 12.

V. STANDARD OF REVIEW FOR PRELIMINARY APPROVAL

The settlement of a class action requires court approval. *See Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794. "In general, questions whether a settlement was fair and reasonable, whether certification of the class was proper, and whether the attorney fee award was proper are matters addressed to the trial court's broad discretion." *Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 234-35 (disapproved on other grounds).

The review and approval of a proposed class action settlement involves a two-step process. *See* Cal. Rules of Court, Rule 3.769(c). First, counsel submit the proposed terms of settlement and the Court makes a preliminary assessment of whether the settlement appears to be sufficiently within the range of a fair settlement to justify providing notice of the proposed settlement to class members. After notice is provided to the class, the Court must conduct a second inquiry into whether the proposed settlement is fair, reasonable and adequate. *See id.*

The initial evaluation of the settlement at the preliminary approval step "is not a fairness hearing." *Armstrong v. Board of School Directors of City of Milwaukee* (7th Cir. 1980) 616 F.2d 305, 314. Rather, the limited purpose of this initial inquiry is to determine, at a threshold level, only whether the proposed settlement is within the range of possible approval and, as a result, "whether there is any reason to notify the class members of the proposed settlement and to proceed with a fairness hearing."

Preliminary approval does not require a court to make a final determination that the settlement is fair, reasonable, and adequate. Rather, that decision is made only at the final approval stage, after notice of the settlement has been given to the class members and they have had an opportunity to object or exclude themselves from the settlement. *See* Cal. Rules of Court 3.769(g). In considering a potential class settlement, the court need not reach any ultimate conclusions on the issues of fact and law which underlie the merits of the dispute, and need not engage in a trial on the merits. *See Officers for Justice v. Civil Service Commission of City and County of San Francisco* (9th Cir. 1982) 688 F.2d 615, 625.

VI. CASE INVESTIGATION AND DAMAGE ANALYSIS (KULLAR/DUNK ANALYSIS)

Plaintiff conducted a comprehensive analysis of the class data provided by Defendant, relevant recordings of all of Plaintiff's calls, Defendant's policies and agreements applicable to Class Members including its Privacy Policies and online disclosures, and other factors concerning risks to obtaining relief for the Settlement Class in this matter and, with the assistance of Hon. Ronald M. Sabraw (Ret.), agreed to a Settlement which provides meaningful relief now for Settlement Class Members. Greenstone Decl. at ¶ 30.

"In the context of a settlement agreement, the test is not the maximum amount plaintiffs might have obtained at trial on the complaint, but rather whether the settlement is reasonable under all of the circumstances." *Wershba v. Apple Computer, Inc.* 91 Cal.App.4th at 250, *disapproved of on other grounds by Hernandez v. Restoration Hardware, Inc.* (2018) 4 Cal.5th 260 (citation omitted). Settlements result from compromise, and "the public interest may indeed be served by a voluntary settlement in which each side gives ground in the interest of avoiding litigation." *Id*. (quoting *Air Line Stewards, etc., Local 550 v. Am. Airlines, Inc*. (7th Cir. 1972) 455 F.2d 101, 109). Nevertheless, the parties must provide the court with "a meaningful and substantiated explanation of the manner in which the factual and legal issues have been evaluated." *Kullar v. Foot Locker Retail Inc*. (2008) 168 Cal.App.4th 116, 118. Courts thus review the information obtained by the parties during their negotiations to assess whether the claims were sufficiently developed before agreeing to the settlement. *Id.* at 129-131. "Sufficient" in this context means enough information to provide the court "an understanding of the amount that is in controversy and the realistic range of outcomes of the

litigation." *Clark v. Am. Residential Servs. LLC* (2009) 175 Cal.App.4th 785, 801. Accordingly, settlements can be reasonable even where they provide substantially narrower relief than could potentially be awarded, if the class were certified and if the plaintiff were to prevail at trial.

As noted above, this case arises out of Defendant's alleged practice of recording Settlement Class Members, including Plaintiff, without obtaining the consent of all parties to the call, which allegedly violated Cal. Pen. C. § 632.7. Complaint at ¶¶ 15-17. Ahead of the mediation, Defendant provided all call recordings with Plaintiff, as well as applicable policies and customer agreements applicable to all Settlement Class Members during the relevant time period from May 18, 2021 through February 8, 2022. Analysis of Plaintiff's call recordings showed that out of the over 20 call recordings Defendant produced, only two calls, which occurred before Plaintiff signed up, did not contain a call recording disclosure. All calls made after Plaintiff created a customer account had a proper recording disclosure. Based upon the information provided, Plaintiff's investigation concluded that while Defendant may not have provided a recording disclosure during the Class Period on initial sales line calls before customers signed up for service, calls made after customers signed up with Defendant were routed through a system that contained a proper call recording disclosure. Defendant also provided data on the number of unique telephone numbers with California area codes for those calls during the Class Period, and the number of customer accounts with which such unique telephone numbers were associated. The information provided and Plaintiff's investigation reflect that Defendant added a call recording disclosure to its system, at the latest, around February 9, 2022. Greenstone Decl. ¶¶ 10, 31.

On November 30, 2024, the Parties attended an all-day mediation with well-respected mediator Hon. Ronald M. Sabraw (Ret.). With the assistance of Judge Sabraw, who assisted the Parties in determining the burdens, uncertainty, and risks inherent in the Action, the Parties eventually reached an agreement to settle the matter through Judge Sabraw's mediator's proposal. The Parties concluded that further prosecution and defense of the Action could be protracted, unduly burdensome, and expensive, and that it is desirable, fair, and beneficial that the Action now be fully and finally compromised, settled and terminated in the manner and upon the terms and conditions set forth in the Agreement. Greenstone Decl. at ¶ 32.

In particular, had this matter not resolved at mediation, Plaintiff would have had to engage in further formal discovery, including depositions, which would have been costly and time consuming. After discovery was completed, Plaintiff would have had to move for class certification and likely fend off a motion for summary judgment, which would have taken multiple months to be briefed and heard. While Plaintiff believes in the merits of this matter, both class certification and summary judgment would have posed a significant risk for multiple reasons. Greenstone Decl. at ¶ 33.

First, there were issues going to the merits specific to this case that posed a risk to the putative Class. As noted above, analysis of Plaintiff's 20-plus calls with Defendant indicated only the first two calls that took place before Plaintiff created an account lacked a recording disclosure. Moreover, the evidence also established that Defendant amended its online Privacy Policy to contain a recording disclosure in September 2021, and similarly amended its customer agreement in 2022. At a minimum, these facts created potential individual issues that could potentially upend class certification. Defendant would likely have argued, for example, that it is impossible to distinguish Class Members who viewed the website Privacy Policy from those who had not without individual inquiry into each Class Member's experience. Greenstone Decl. at ¶ 34.

Second, Defendant asserted multiple defenses applicable generally to CIPA unlawful recording cases that pose an ever-present danger to achieving certification and prevailing at trial. Throughout the litigation, Defendant denied Plaintiff's allegations and denied that the case was appropriate for class certification. Defendant would have been able to raise multiple defenses, including that the CIPA only applies to California residents and California phone area codes do not inherently indicate someone was a California resident at the time of the call. Plaintiff anticipates Defendant would have also argued that there was no effective way to determine whether someone actually spoke on a call and thus was recorded. Plaintiff would have responded that the first issue is an "opt out" issue where class members could affirm they were California residents, and the latter could be handled by sorting by call length. But Defendant could counter that Plaintiff is obligated to identify and confirm actual class members and not rely on self-identification (which is inherently self-interested), and that call length is an imperfect proxy for listening to the calls, which would require significant individual analysis. Defendant also asserted a First Amendment defense to Plaintiff's

claims, arguing that it had a constitution/free speech right to engage in one-sided recordings, as such recordings constitute an exercise of speech because they are a form of protected expression, citing to the recent Ninth Circuit decision *Project Veritas v. Schmidt* (9th Cir. 2023) 72 F.4th 1043. Defendant therefore contended that it could not be prohibited from and penalized for making such recordings by state laws like CIPA or that, at a minimum, determining whether penalizing Defendant would be constitutional requires recording by recording analysis. Defendant further indicated it would challenge and oppose class certification on consent, adequacy, typicality, and predominance grounds. Lastly, Defendant argued that even if Plaintiff was able to certify a class and prevailed at trial, it would be unlikely that a court would impose the maximum amount of penalties as putative class members suffered no injury or damages from the failure to disclose the recording of their initial sales calls; and Defendant would be able to undisputedly show that any subsequent calls contained a recording disclosure. Therefore, Settlement Class Counsel acknowledged that these defenses presented significant risks to both obtaining class action status and maintaining it. Greenstone Decl. at ¶ 35.

While CIPA provides for a $5,000 statutory penalty for each violation, cases in this practice area do not typically value the class claims anywhere near $5,000 per violation or even $5,000 per class member. This is unrealistic due to the aforementioned significant uncertainties and numerous litigation risks facing these class actions and because the resulting penalties (multiple violations for over 25,000 Settlement Class Members) would total at several hundreds of millions of dollars, which is potentially ruinous to most businesses. As a result, maximum exposure under CIPA is typically steeply discounted class action settlements. Plaintiff also notes that Class Members in this case can receive up to $5,000 under the Settlement (i.e., the statutory maximum) depending on the claims rate. Agreement ¶ 3.4. Based on the common gross settlement fund amount of $1,747,500.00 and Settlement Class size of 25,672 individuals, the average gross settlement value on a per person basis is approximately $68.07. This amount is well *above* the range of settlements regularly approved in both state and federal court for CIPA cases; courts in California have approved as little as $6.98 per class member. *Skuro v. BMW of N. Am., LLC* (C.D. Cal. Aug. 28, 2013) 2:10-cv-08672 (approximately $6.98 average gross settlement value per class member). *See also, e.g., Brown v. Def. Sec. Co.* (C.D. Cal. Mar. 18, 2014) No. CV1207319CASPJWX, 2014 WL 12586786 (approximately $9.29 average

gross settlement value per class member); *Fanning v. HSBC Card Services Inc.* (C.D. Cal. May 5, 2014) No. SACV1200885JVSRNBX (approximately $7.50 average gross settlement value per class member); *McCabe v. Six Continents Hotels, Inc.* (N.D. Cal. Feb. 8, 2016) No. 12-CV-04818 NC, 2016 WL 491332 (approximately $16.76 average gross settlement value per class member); *Zaw v. Nelnet Bus. Solutions, Inc.* (N.D. Cal. Dec. 1, 2014) 3:13-cv-05788 (approximately $11.41 average gross settlement value per class member); *Granina v. Eddie Bauer LLC* (April 23, 2018) L.A.S.C. Case No. BC569111 (approximately $19.29 average gross settlement value per class member); *Macomber v. Dermalogica, LLC* (July 8, 2022) S.D.S.C. No. 37-2020-0020451 (approximately $40 average gross settlement value per class member); *Saunders v. Cabelas Inc.* (August 8, 2017) S.F.S.C. No. CGC-14-537095 (approximately $26.61 average gross settlement value per class member); *Vaccaro v. Super Care, Inc.* (March 10, 2023) L.A.S.C. Case No. 20STCV03833 (approximately $10.07 average gross settlement value per class member); and *Vaccaro v. Delta Drugs II, Inc.* (March 2, 2023) L.A.S.C. Case No. 20STCV28871 (approximately $30 average gross settlement value per class member). Further, as previously explained, after a thorough investigation and analysis of Defendant's data and information, Settlement Class Counsel determined that Defendant's call recordings only lacked the call recording disclosure for the initial sales call prior to its customers signing up and any subsequent calls undisputedly contained a call recording disclosure. Therefore, the average gross settlement recovery per Settlement Class Member obtained here essentially equates to an average gross settlement recovery per call, as each Settlement Class Member most likely only experienced one call, the initial sales call, that lacked a call recording disclosure. Greenstone Decl. at ¶ 36.

Taking into account the burdens, uncertainty and risks inherent in this litigation, Settlement Class Counsel concluded that further prosecution of this action could be protracted, unduly burdensome, and expensive, and that it is desirable, fair, and beneficial to the Settlement Class that the Action now be fully and finally compromised, settled and terminated in the manner and upon the terms and conditions set forth in the Agreement. Greenstone Decl. at ¶ 37.

Given these significant ongoing risks to both certification and merits, and the reality that even if Plaintiff prevailed at trial, possible appeals would substantially delay any recovery by the Settlement Class, Plaintiff determined that it was advantageous to settle on the terms memorialized in the

Agreement. Accordingly, in light of the Parties' respective legal positions and the risks to potential recovery, it is clear that the Gross Settlement Amount is fair, adequate, and reasonable. Greenstone Decl. at ¶ 38.

VII. CERTIFICATION FOR SETTLEMENT PURPOSES IS WARRANTED

Code of Civil Procedure § 382 provides that three basic requirements must be met in order to sustain any class action: (1) there must be an ascertainable class; (2) there must be a well-defined community of interest in the question of law or fact affecting the parties to be represented; and (3) certification will provide substantial benefits to litigants and the courts, *i.e.*, proceeding as a class is superior to other methods. *See Dunk,* 48 Cal.App.4th at 1806. Plaintiff contends that this matter, which is based entirely upon the narrow issue of Defendant's call-recording practices, satisfies the class certification requirements under California Code of Civil Procedure § 382. Defendant denies Plaintiff's allegations, but for purposes of this Settlement only, Defendant has stipulated to certification of the proposed class action.

A. An Ascertainable and Numerous Class Exists

Whether an ascertainable class exists turns on three factors: (1) the class definition, (2) the size of the class, and (3) the means of identifying the class members. *See Miller v. Woods* (1983) 148 Cal.App.3d 862, 873. In this case, all three considerations strongly favor class certification. Here, the Settlement Class is defined as all natural persons listed in Intoxalock's records that have a California address and/or telephone number bearing a California prefix and who had one or more telephone conversations with an Intoxalock sales representative at any time during the period from and including May 18, 2021 through February 8, 2022. Agreement ¶ 1(o). This provides a clear and definite scope for the proposed class.

Next, the Settlement Class is sufficiently numerous. There is no magic number that satisfies the numerosity requirement. Under the Federal Rules, the minimum number of a class is one-hundred individuals. Under California law, that number is significantly less. *See e.g., Rose v. City of Haywood* (1981) 126 Cal.App.3d 926, 934 (holding forty-two class members sufficient to satisfy numerosity). Here, the estimated Settlement Class size of 25,672 Settlement Class Members plainly favors class certification.

Finally, the question whether class members are easily identifiable turns on whether a plaintiff can establish "the existence of an ascertainable class." *Daar v. Yellow Cab Co.* (1967) 67 Cal.2d 695, 706. The existence of an ascertainable class in this case can be established through Defendant's records, and the class definition is sufficiently specific to enable the Parties, potential Settlement Class Members and the Court to determine the parameters of the Settlement Class. *See Clothesrigger, Inc. v. GTE Corp.* (1987) 191 Cal.App.3d 605, 617 (proposed class defined as all persons nationwide subscribing to telephone service since January 1, 1981, who were charged for long distance calls deemed "plainly" ascertainable).

B. The Class Shares a Well-Defined Community of Interest

Plaintiff, like all Settlement Class Members, was allegedly recorded by Defendant without his consent during phone calls that occurred during the Class Period, such that there is clearly a community of interest between Plaintiff and the Settlement Class. The community of interest requirement embodies three factors: (1) predominant questions of law and fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class. *Dunk*, 48 Cal.App.4th at 1806. Plaintiff easily satisfies all three requirements.

The common question of law about whether Defendant's alleged calling practices resulted in the recording of phone calls with Settlement Class Members without their consent and whether such practice violates CIPA is the predominant question in this litigation. Predominance "hinges on 'whether the theory of recovery advanced by the proponents of certification is, as an analytical matter, likely to prove amenable to class treatment." *Wilson v. La Jolla Grp*. (2021) 276 Cal. Rptr. 3d 118, 125 (quoting *Duran v. U.S. Bank Nat'l Assn*. (2014) 59 Cal.4th 1, 28). Moreover, predominance "is a comparative concept, and 'the necessity for class members to individually establish eligibility and damages does not mean individual fact questions predominate.'" *Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 334. The theory of recovery advanced by Plaintiff is amenable to class treatment because it arises out of the same course and conduct for the same alleged violations of CIPA. Thus, the claims predominate.

To satisfy the typicality requirement, California law does not require that a plaintiff have

claims identical to the other class members. Rather, the test of typicality for a class representative is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiff, and whether other class members have been injured by the same alleged course of conduct. *See Seastrom v. Neways, Inc.* (2007) 149 Cal.App.4th 1496, 1502. The typicality requirement for a class representative refers to the nature of the claim or defense of the representative, and not to the specific facts from which it arose or the relief sought. *See id*.

There is typicality here for the same reason that the claims predominate. Plaintiff, like all Settlement Class Members, was allegedly recorded by Defendant without his consent during phone calls that occurred between May 18, 2021 through February 8, 2022. Complaint ¶ 15. Here, Plaintiff alleges that his claims are similar to those of the other Settlement Class Members. Plaintiff's claims arise out of the same alleged facts and course of conduct giving rise to the claims of the other Settlement Class Members. Finally, Plaintiff's claims are typical of the other Settlement Class Members because he seeks the same relief for the alleged violations. Because Plaintiff's CIPA claims are based upon the same alleged conduct and practices as those of Settlement Class Members, the typicality requirement has been satisfied.

Finally, the question of adequacy of representation "depends on whether the plaintiff's attorney qualifies to conduct the proposed litigation in the plaintiff's interest or not antagonistic to the interests of the class." *McGee v. Bank of America* (1976) 60 Cal.App.3d 442, 450. Here, these considerations are satisfied. Counsel for Plaintiff include well-regarded and accomplished lawyers who are qualified and experienced in class-action litigation. Greenstone Decl. ¶¶ 2-7. Further, Plaintiff, who has agreed to act as a class representative, understands his responsibilities and has considered the interests of the Settlement Class above his own in litigating this Action. Declaration of Chris Swearingin ("Swearingin Decl.") ¶¶ 5-6, 12. Plaintiff will vigorously, adequately, and fairly represent the interests of the Settlement Class. Because Plaintiff's claims are typical of other Settlement Class Members and are not based on unique circumstances, there is no antagonism between the interests of Plaintiff and the Settlement Class.

C. A Class Action is Superior to a Multiplicity of Litigation

Under the circumstances, proceeding as a class action is a superior means of resolving the

Action, as the Settlement Class Members and the court will derive substantial benefits. Class certification would serve as the only means to deter and redress the alleged violations. *See Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 434 (relevant considerations include the probability that each class member will come forward to prove his or her separate claim and whether the class approach would actually serve to deter and redress the alleged wrongdoing). Further, individual actions arising out of the same operative facts would unduly burden the courts and could lead to inconsistent results. Therefore, class action proceedings are superior to individual litigation.

VIII. THE REQUESTED SERVICE AWARD IS REASONABLE

Plaintiffs in class action lawsuits are eligible for reasonable incentive payments as compensation "for the expense or risk they have incurred in conferring a benefit on other members of the class." *Munoz v. BCI Coca-Cola Bottling Co.* (2010) 186 Cal.App.4th 399, 412. Courts routinely grant approval of class action settlement agreements containing enhancements for the class representatives, which are necessary to provide incentive to represent the class and are appropriate given the benefit the class representatives help to bring about for the class. *See Van Vranken v. Atlantic Richfield Co.* (N.D. Cal. 1995) 901 F.Supp. 294, 299 (approving $50,000 enhancement).

Plaintiff initiated and has stepped forward in the lawsuit on behalf of all Settlement Class Members, who will now benefit from the Settlement. Plaintiff invested his personal time and effort into the Action, including reviewing documents as requested, and multiple discussions with Settlement Class Counsel. *See* Swearingin Decl. ¶¶ 7-9; Further, the requested amount is also extremely reasonable given the benefit gained by other Settlement Class Members. For these reasons, Plaintiff would request that the Court award him a service award of $5,000.00. Notice of the requested service award will also be disclosed to the Settlement Class Members in the long-form Settlement Class Notice and should be preliminarily approved by the Court. *See* Agreement, Ex. D. Greenstone Decl. ¶ 39.

IX. REQUESTED ATTORNEYS' FEE AND COSTS

Trial courts have "wide latitude" in assessing the value of attorneys' fees and their decisions will "not be disturbed on appeal absent a manifest abuse of discretion." *Lealao v. Beneficial Cal, Inc.* (2000) 82 Cal.App.4th 19, 41. California law provides that attorney fee awards should be equivalent

to fees paid in the legal marketplace to compensate for the result achieved and risk incurred. *Id.* at 47. In cases where class members present claims against a common fund and the defendant agrees to the use of a percentage of the fund as part of the settlement, use of the percentage method is appropriate. *Id.* at 32.

Here, the requested attorneys' fees of $582,500.00, which is one-third, i.e. 33 1/3%, of the common fund, will be disclosed to Settlement Class Members in the proposed long-form Settlement Class Notice. *See* Agreement, Ex. D. The requested fee was freely negotiated, is common in the legal marketplace, and is not opposed by Defendant. The Motion for Final Approval will elaborate on the nature of the legal services provided and will also support Settlement Class Counsel's request for the reimbursement of litigation costs not to exceed $35,000.00. Greenstone Decl. ¶¶ 40-42.

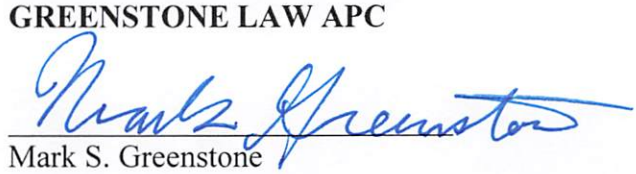
X. CONCLUSION

For all of the foregoing reasons, Plaintiff respectfully requests that this Court grant Plaintiff's Motion for Preliminary Approval, sign the proposed Preliminary Approval Order, which is submitted herewith, and schedule the Final Approval Hearing.

Respectfully submitted,

DATED: September 30, 2024

GREENSTONE LAW APC

By: 

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